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SENATE BILL 1499 By
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HOUSE BILL 1326
By McMillan

AN ACT to amend Tennessee Code Annotated, Section 39-14-133
and Title 56, relative to insurance fraud.

WHEREAS, The legislature finds that insurance fraud is pervasive and expensive, costing consumers and the business community of this state millions of dollars each year. Each family spends in excess of several hundreds of dollars each year in direct and indirect costs attributable to insurance fraud. Insurance fraud increases premiums, places businesses at risk and is a leading cause of insurance company insolvencies. Insurance fraud reduces consumers' ability to raise their standard of living and decreases the economic vitality of this state; and

WHEREAS, the legislature believes that the state of Tennessee must aggressively confront the problem of insurance fraud by facilitating the detection, reducing the occurrence through stricter enforcement and deterrence, requiring restitution, and increasing the partnership among consumers, the insurance industry and the state in coordinating efforts to combat insurance fraud; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 56, is amended by adding Sections 2 through 13 as a new chapter thereto.

SECTION 2. As used in this act, unless the context requires otherwise, the following terms have the meaning ascribed to them in this section.

(1) "Actual Malice" means knowledge that information is false, or reckless disregard of whether it is false.

(2) "Conceal" means to take affirmative action to prevent others from discovering information. Mere failure to disclose information does not constitute concealment. Action by the holder of a legal privilege, or one who has a reasonable belief that a privilege exists, to prevent discovery of privileged information does not constitute concealment.

(3) "Insurance Policy" means the written instrument in which are set forth the terms of any certificate of insurance, binder of coverage or contract of insurance (including a certificate, binder or contract issued by a state-assigned risk plan); benefit plan; nonprofit hospital service plan; health maintenance organization; motor club service plan; or surety bond, cash bond or any other alternative to insurance authorized by a state's financial responsibility act. "Insurance Policy" also means any other instruments authorized or regulated by the department of commerce and insurance.

(4) "Insurance Professional" means sales agents, managing general agents, brokers, producers, adjusters and third party administrators.

(5) "Insurance Transaction" means a transaction by, between or among:

(A) An insurer or a person who acts on behalf of an insurer; and

(B) An insured, claimant, applicant for insurance, public adjuster, insurance professional, practitioner, or any person who acts on behalf of any of the foregoing; for the purpose of obtaining insurance or

reinsurance, calculating insurance premiums, submitting a claim, negotiating or adjusting a claim, or otherwise obtaining insurance, self-insurance, or reinsurance or obtaining the benefits thereof or therefrom.

(6) "Insurer" means any person purporting to engage in the business of insurance or authorized to do business in the state or subject to regulation by the state, who undertakes to indemnify another against loss, damage or liability arising from a contingent or unknown event. "Insurer" includes, but is not limited to, an insurance company; self-insurer; reinsurer; reciprocal exchange; interinsurer; risk retention group; Lloyd's insurer; fraternal benefit society; surety; medical service; health maintenance organization; dental, optometric or any other similar health service plan; and any other legal entity engaged or purportedly engaged in the business of insurance, including any person or entity which falls within the definition of "insurer" found within title 56.

(7) "Pattern or practice" means repeated, routine or generalized in nature, and not merely isolated or sporadic.

(8) "Person" means a natural person, company, corporation, unincorporated association, partnership, professional corporation, agency of government and any other entity.

(9) "Practitioner" means a licensee of this state authorized to practice medicine and surgery, psychology, chiropractic or law or any other licensee of the state or person required to be licensed in the state whose services are compensated either in whole or in part, directly or indirectly, by insurance proceeds, including, but not limited to, automotive repair shops, building contractors and insurance adjusters, or a licensee similarly licensed in other states and nations or the licensed practitioner of any nonmedical treatment rendered in accordance with a recognized religious method of healing.

(10) "Premium" means consideration paid or payable for coverage under an insurance policy. "Premium" includes any payments, whether due within the insurance policy term or otherwise, and deductible payments, whether advanced by the insurer or insurance professional and subject to reimbursement by the insured or otherwise, any self-insured retention or payments, whether advanced by the insurer or insurance professional and subject to reimbursement by the insured or otherwise, and any collateral or security to be provided to collateralize obligations to pay any of the above.

(11) "Premium Finance Company" means a person engaged or purporting to engage in the business of advancing money, directly or indirectly, to an insurer or producer at the request of an insured pursuant to the terms of a premium finance agreement, including but not limited to loan contracts, notes, agreements or obligations, wherein the insured has assigned the unearned premiums, accrued dividends, or loss payments as security for such advancement in payment of premiums on insurance policies only, and does not include the financing of insurance premiums purchased in connection with the financing of goods and services.

(12) "Premium Finance Transaction" means a transaction by, between or among an insured, a producer or other party claiming to act on behalf of an insured and a third-party premium finance company, for the purposes of purportedly or actually advancing money directly or indirectly to an insurer or producer at the request of an insured pursuant to the terms of a premium finance agreement, wherein the insured has assigned the unearned premiums, accrued dividends or loan payments as security for such advancement in payment of premiums on insurance policies only, and does not include the financing of

insurance premiums purchased in connection with the financing of goods and services.

(13) "Reckless" means without reasonable belief of the truth, or, for the purposes of Section 4(a)(3), with a high degree of awareness of probable insolvency.

(14) "Withhold" means to fail to disclose facts or information which any law (other than this act) requires to be disclosed. Mere failure to disclose information does not constitute "withholding" if the one failing to disclose reasonably believes that there is no duty to disclose.

SECTION 3. Fraudulent Insurance Act

(a) Any person who, knowingly and with intent to defraud, and for the purpose of depriving another of property or for pecuniary gain, commits, participates in or aids, abets, or conspires to commit or solicits another person to commit, or intentionally permits its employees or its agents to commit any of the following acts, has committed a fraudulent insurance act:

(1) Presents, causes to be presented, or prepares with knowledge or belief that it will be presented, by or on behalf of an insured, claimant or applicant to an insurer, insurance professional or premium finance company in connection with an insurance transaction or premium finance transaction, any information which contains false representations as to any material fact, or which withholds or conceals a material fact concerning any of the following:

(A) The application for, rating of, or renewal of, any insurance policy;

(B) A claim for payment or benefit pursuant to any insurance policy;

(C) Payments made in accordance with the terms of any insurance policy;

(D) The application used in any premium finance transaction;

(2) Presents, causes to be presented, or prepares with knowledge or belief that it will be presented, to or by an insurer, insurance professional or a premium finance company in connection with an insurance transaction or premium finance transaction, any information which contains false representations as to any material fact, or which withholds or conceals a material fact, concerning any of the following:

(A) The solicitation for sale of any insurance policy or purported insurance policy;

(B) An application for certificate of authority;

(C) The financial condition of any insurer;

(D) The acquisition, formation, merger, affiliation or dissolution of any insurer;

(3) Solicits or accepts new or renewal insurance risks by or for an insolvent insurer;

(4) Removes the assets or records of assets, transactions and affairs or such material part thereof, from the home office or other place of business of the insurer, or from the place of safekeeping of the insurer, or destroys or sequesters the same from the department; or

(5) Diverts, misappropriates, converts or embezzles funds of an insurer, an insured, claimant or applicant for insurance in connection with:

(A) An insurance transaction;

(B) The conduct of business activities by an insurer or insurance professional;

(C) The acquisition, formation, merger, affiliation or dissolution of any insurer.

(b) It shall be unlawful for any person to commit, or to attempt to commit, or aid, assist, abet or solicit another to commit, or to conspire to commit a fraudulent insurance act.

SECTION 4. Unlawful Insurance Act

(a) Any person who commits, participates in, or aids, abets, or conspires to commit, or solicits another person to commit, or permits its employees or its agents to commit any of the following acts with an intent to induce reliance, has committed an unlawful insurance act:

(1) Presents, causes to be presented, or prepares with knowledge or belief that it will be presented, by or on behalf of an insured, claimant or applicant to an insurer, insurance professional or a premium finance company in connection with an insurance transaction or premium finance transaction, any information which the person knows to contain false representations, or representations the falsity of which the person has recklessly disregarded, as to any material fact, or which withholds or conceals a material fact, concerning any of the following:

(A) The application for, rating of, or renewal of, any insurance policy;

(B) A claim for payment or benefit pursuant to any insurance policy;

(C) Payments made in accordance with the terms of any insurance policy;

(D) The application for the financing of any insurance premium;

(2) Presents, causes to be presented, or prepares with knowledge or belief that it will be presented, to or by an insurer, insurance professional or a premium finance company in connection with an insurance transaction or premium finance transaction, any information which the person knows to contain false representations, or representations the falsity of which the person has recklessly disregarded, as to any material fact, or which withholds or conceals a material fact, concerning any of the following:

(A) The solicitation for sale of any insurance policy or purported insurance policy;

(B) An application for certificate of authority;

(C) The financial condition of any insurer;

(D) The acquisition, formation, merger, affiliation or dissolution of any insurer; or

(3) Solicits or accepts new or renewal insurance risks by or for an insurer which the person knows was insolvent or the insolvency of which the person recklessly disregards.

(b) It shall be unlawful for any person to commit, or to attempt to commit, or aid, assist, abet or solicit another to commit, or to conspire to commit an unlawful insurance act.

SECTION 5. Criminal Penalties

A person who violates Section 3 of this act is guilty of:

(1) A Class A misdemeanor if the greater of:

(A) the value of property, services or other benefit the person wrongfully obtained, or attempted to obtain or

(B) the segregate or aggregate economic loss suffered by any person or persons as a result of the violation of Section 3;

is five hundred dollars (\$500) or less;

(2) A Class E felony if:

(A) the greater of:

(i) the value of property, services or other benefit the person wrongfully obtained, or attempted to obtain; or

(ii) the segregate or aggregate economic loss suffered by any person or persons as a result of the violation of Section 3;

is more than five hundred dollars (\$500) but less than one thousand dollars (\$1,000); or

(B) the greater of:

(i) the value of property, services or other benefit the person wrongfully obtained, or attempted to obtain; or

(ii) the segregate or aggregate economic loss suffered by any person or persons as a result of the violation of Section 3,

is less than five hundred dollars (\$500), and the defendant has been previously convicted of any class or degree of insurance fraud in any jurisdiction;

(3) A Class D felony if the greater of:

(A) the value of property, services or other benefit the person wrongfully obtained, or attempted to obtain; or

(B) the segregate or aggregate economic loss suffered by any person or persons as a result of his violation of Section 3,

is one thousand dollars (\$1,000) or more but less than ten thousand dollars (\$10,000);

(4) A Class C felony if the greater of:

(A) the value of property, services or other benefit the person wrongfully obtained, or attempted to obtain; or

(B) the segregate or aggregate economic loss suffered by any person or persons as a result of the violation of Section 3, is ten thousand dollars (\$10,000) or more but less than sixty thousand dollars (\$60,000);

(5) A Class B felony if the greater of:

(A) the value of property, services or other benefit the person wrongfully obtained, or attempted to obtain; or

(B) the segregate or aggregate economic loss suffered by any person or persons as a result of the violation of Section 3, is sixty thousand dollars (\$60,000) or more.

SECTION 6. Restitution

(a) A person convicted of a violation of Section 3 shall be ordered to make monetary restitution for any financial loss or damages sustained by any other person as a result of the violation. Financial loss or damage shall include, but is not necessarily limited to, loss of earnings, out-of-pocket and other expenses, paid deductible amounts under an insurance policy, insurer claim payments, cost reasonably attributed to investigations and recovery efforts by owners, insurers, insurance professionals, law enforcement and other public authorities, and cost of prosecution.

(b) When restitution is ordered, the court shall determine its extent and methods. Restitution may be imposed in addition to a fine and, if ordered, any other penalty, but not in lieu thereof. The court shall determine whether restitution, if ordered, shall be paid in a single payment or installments and shall fix a period of time, not in excess of three (3) years, within which payment of restitution is to be made in full.

SECTION 7. Administrative Penalties

(a)

(1) Any practitioner determined by the court to have violated Section 3 shall be deemed to have committed an act involving moral turpitude that is inimical to the public well being. The court or prosecutor shall notify the appropriate licensing authority in this state of the judgment for appropriate disciplinary action, including revocation of any such professional license(s), and may notify appropriate licensing authorities in any other jurisdictions where the practitioner is licensed. Any victim may notify the appropriate licensing authorities in this state and any other jurisdiction where the practitioner is licensed, of the conviction.

(2) Upon notification of a conviction of the crimes enumerated in Section 3 or a substantially similar crime under the laws of another state or the United States, this state's appropriate licensing authority shall hold an administrative hearing, or take other appropriate administrative action authorized by state law, to consider the imposition of the administrative sanctions as provided by law against the practitioner. Where the practitioner has been convicted of a felony violation of Section 3 or a substantially similar crime under the laws of another state or of the United States, this state's appropriate licensing authority shall hold an administrative hearing, or take other appropriate administrative action authorized by state law, and shall summarily and permanently revoke the license. It is hereby recommended by the legislature that the supreme court shall summarily and permanently disbar any attorney found guilty of such felony.

(3) All such referrals to the appropriate licensing or other agencies, and all dispositive actions thereof, shall be a matter of public record.

(b)

(1) A person convicted of a felony involving dishonesty or breach of trust shall not participate in the business of insurance.

(2) A person in the business of insurance shall not knowingly or intentionally permit a person convicted of a felony involving dishonesty or breach of trust to participate in the business of insurance.

SECTION 8. Civil Remedies

(a) Any person injured in such person's business or property by reason of a violation of Section 4 may recover therefor from the person(s) violating Section 4, in any appropriate court having jurisdiction, the following:

(1) Return of any profit, benefit, compensation or payment received by the person violating Section 4 directly resulting from said violation; and

(2) Reasonable attorneys fees, related legal expenses, including internal legal expenses and court costs, not to exceed five thousand dollars (\$5,000);

An action maintained under this subsection may neither be certified as a class action nor be made part of a class action.

(b) Any person injured in such person's business or property by reason of a violation of Section 3 may recover therefor from the person(s) violating Section 3, in any appropriate court having jurisdiction, the following:

(1) Return of any profit, benefit, compensation or payment received by the person violating Section 3 directly resulting from said violation;

(2) Reasonable attorneys' fees, related legal expenses, including internal legal expenses and court costs;

(3) All other economic damages directly resulting from the violation of Section 3;

(4) Reasonable investigative fees based on a reasonable estimate of the time and expense incurred in the investigation of the violation(s) of Section 3 proved at trial; and

(5) A penalty of no less than one hundred dollars (\$100) and no greater than ten thousand dollars (\$10,000).

An action maintained under this subsection may neither be certified as a class action nor be made part of a class action.

(c) Any person injured in such person's business or property by a person violating Section 3, upon a showing of clear and convincing evidence that such violation was part of a pattern or practice of such violations, shall be entitled to recover threefold the injured person's economic damages. An action for treble damages must be brought within three (3) years of such violation. One-third (1/3) of the treble damages awarded shall be payable to the state to be used solely for the purpose of investigation and prosecution of violations of this act or other fraudulent behavior relating to insurance transactions, or for public education relating to insurance fraud. An action maintained under this subsection may neither be certified as class action nor be made part of a class action, unless the violations of Section 3 giving rise to the action resulted in criminal conviction of the violator(s) under Section 5.

(d) The attorney general and reporter, district attorney general or other prosecutorial agency shall have authority to maintain civil proceedings on behalf of the department of commerce and insurance and any victims of violations of Section 3. In any such action, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(1) The circuit and chancery courts of the state shall have jurisdiction to prevent and restrain violations of Section 3 by issuing appropriate orders.

(2) In any action commenced under this subsection, the court, upon finding that any person has violated Section 3, shall levy a fine of up to five thousand dollars (\$5,000) for each violation.

Any court in which a prosecution for violation of Section 3 is pending shall have authority to stay or limit proceedings in any civil action regarding the same or related conduct. Any court in which is pending a civil action brought pursuant to this subsection may stay or limit proceedings in actions brought pursuant to subsections (a)-(c) regarding the same or related conduct or may transfer such actions or consolidate them before itself or allow the plaintiffs in such actions to participate in the action brought pursuant to this subsection, as it shall prescribe.

(e) Any cause of action under this section for violation of Section 3 or Section 4 must be brought within three (3) years of the commission of the acts constituting such violation, or within three (3) years of the time the plaintiff discovered (or with reasonable diligence could have discovered) such acts, whichever is later.

(f) An insurer shall not pay damages awarded under this section, or provide a defense or money for a defense, on behalf of an insured under a contract of insurance or indemnification. A third party who has asserted a claim against an insured shall have no cause of action under this section against the insurer of the insured arising out of the insurer's processing or settlement of the third party's claim. An obligee under a surety bond shall not have a cause of action under this section against the surety arising out of the surety's processing or settlement of the obligee's claim against the bond.

(g) Any person injured in such person's business or property by reason of a violation of Section 3 or Section 4 may recover under only one (1) of the subsections of this section.

SECTION 9. Exclusivity of Remedies

The remedies expressly provided in Section 8 shall be the only private remedies for violations of this act and no additional remedies shall be implied. The remedies available under Section 8 shall not be used in conjunction with or in addition to any other remedies available at law or in equity to duplicate recovery for the same element of economic damage. Further, in any civil action pleading both exemplary damages and the treble damages available in Section 8(c), plaintiff shall elect one (1) or the other remedy, but not both, at the conclusion of the evidentiary phase of the trial; provided, nothing in this act shall limit or abrogate any right of action which would have existed in the absence of this act, but no action based on such a right shall rely on this act to establish a standard of conduct or for any other purpose.

SECTION 10. Cooperation

(a) When any law enforcement official or authority, any insurance department, state division of insurance fraud, or state or federal regulatory or licensing authority requests information from an insurer or insurance professional for the purpose of detecting, prosecuting or preventing insurance fraud, the insurer or insurance professional shall take all reasonable actions to provide the information requested, subject to any legal privilege protecting such information.

(b) Any insurer or insurance professional that has reasonable belief that an act violating Sections 3 or 4 will be, is being, or has been committed shall furnish and disclose any information in its possession concerning such act to the appropriate law enforcement official or authority, insurance department, state division of insurance fraud, or state or federal regulatory or licensing authority, subject to any legal privilege protecting such information. In no case shall the information be required by subpoena or otherwise to be given to the person alleged to have committed a violation, unless in possession of an insurer and that insurer used the information to deny a claim of the person, in whole or in part.

(c) An insurer or insurance professional providing information to any law enforcement, regulatory, licensing or other governmental agency under subsections (a) or (b), shall have the right to request information in the possession or control of the agency relating to the suspected violation or to a pattern of related activity, except information which was privileged or confidential under the laws of this state prior to its submission to the agency. In instances where disclosure would not jeopardize an ongoing investigation or prosecution, the agency shall provide the requested information to the insurer or insurance professional. The agency may request that the insurer or insurance professional keep the disclosed information confidential.

(d) Any person that has a reasonable belief that an act violating this act will be, is being, or has been committed; or any person who collects, reviews or analyzes information concerning insurance fraud may furnish and disclose any information in its possession concerning such act to an authorized representative of an insurer that requests the information for the purpose of detecting, prosecuting or preventing insurance fraud.

(e) Failure to cooperate with a request for information from an appropriate local, state or federal governmental authority shall bar a person's eligibility for restitution from any proceeds resulting from such governmental investigation and prosecution.

SECTION 11. Immunity

In the absence of actual malice, no person furnishing, disclosing or requesting information pursuant to Section 10 shall be subject to civil liability for libel, slander, or any other cause of action arising from the furnishing, disclosing or requesting of such information. No person providing information pursuant to Section 10(a) shall be subject to civil liability for any cause of action arising from the person's provision of requested information. Any person against whom any action is brought who is found to be immune from liability under this section, shall be entitled to recover reasonable attorney's fees and costs from the person or party who

brought the action. This section does not abrogate or modify in any way any common law or statutory privilege or immunity heretofore enjoyed by any person.

SECTION 12. Regulatory Requirements

(a) Anti-Fraud Plans

Within six months of the effective date of this legislation, every insurer with direct written premiums shall prepare, implement, maintain and submit to the department of commerce and insurance an insurance anti-fraud plan. Each insurer's anti-fraud plan shall outline specific procedures, appropriate to the type of insurance the insurer writes in this state, to:

- (1) Prevent, detect and investigate all forms of insurance fraud, including fraud involving the insurer's employees or agents; fraud resulting from misrepresentations in the application, renewal or rating of insurance policies; claims fraud; and security of the insurer's data processing systems;
- (2) Educate appropriate employees on fraud detection and the insurer's anti-fraud plan;
- (3) Provide for the hiring of or contracting for fraud investigators;
- (4) Report insurance fraud to appropriate law enforcement and regulatory authorities in the investigation and prosecution of insurance fraud; and
- (5) Pursue restitution for financial loss caused by insurance fraud, where appropriate.

The commissioner may review each insurer's anti-fraud plan to determine if it complies with the requirements of this subsection.

It shall be the responsibility of the commissioner to assure insurer compliance with anti-fraud plans submitted to the commissioner. The commissioner may require reasonable modification of the insurer's anti-fraud plan, or may require other reasonable remedial action if the review or examination reveals substantial non-compliance with the terms of the insurer's own anti-fraud plan.

The commissioner may require each insurer to file a summary of the insurer's anti-fraud activities and results. The anti-fraud plans and the summary of the insurer's anti-fraud activities and results are not public records and are exempt from the public records act, and shall be proprietary and not subject to public examination, and shall not be discoverable or admissible in civil litigation.

This subsection confers no private rights of action.

(b) Fraud Warnings

(1)

(A) No later than six (6) months after the effective date of this Act, all applications for insurance, and all claim forms regardless of the form of transmission provided and required by an insurer or required by law as a condition of payment of a claim, shall contain a statement, permanently affixed to the application or claim form, that clearly states in substance the following:

"It is a crime to knowingly provide false, incomplete or misleading information to an insurance company for the purpose of defrauding the company. Penalties include imprisonment, fines and denial of insurance benefits."

(B) The lack of a statement required in this subsection does not constitute a defense in any criminal prosecution under Section 3 nor in any civil action under Sections 3 or 4.

(2) The warning required by this subsection shall not be required on forms relating to reinsurance.

(c) Enforcement

Notwithstanding any other provision of law, the following are the exclusive monetary penalties for violation of this section. Insurers that fail to prepare, implement,

maintain and submit to the department an insurance anti-fraud plan are subject to a penalty of five hundred dollars (\$500) per day, not to exceed twenty-five thousand dollars (\$25,000).

SECTION 13. Nothing in this act shall apply to a workers compensation insurance policy as defined in Section 56-47-102(3), and the Workers Compensation Fraud Act, Section 56-47-101 et seq., shall continue in full force and effect.

SECTION 14. Tennessee Code Annotated, Section 39-14-133, is amended by repealing the section in its entirety.

SECTION 15. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 16. This act shall take effect July 1, 2001, the public welfare requiring it.